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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ROBERT ALLEN, JR., LARRY MAURICE, LAWRENCE JERRY, DONALD JERRY, STAN MOSES, BURT MOSES, EDWIN B. DANIELS, HOWARD MOSES, BETTY GOUDY, HENRY KING GEORGE, WALTER ALLEN, ANDY DOMINICK, ARCHIE LEBEHAN, CECIL MOSES, and the MUCKLESHOOT TRIBE OF INDIANS,
Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO BRIEF OF *AMICUS CURIAE*

By the letter of November 10, 1967, of the Clerk of this Court, appellants were authorized to file a memorandum in response to the views of the United States as expressed by her Solicitor General.

The attack on these appellants which worried the Solicitor General is expressed in his footnote 1, page 2, as follows:

"The State Supreme Court held that the correctness of the trial court's factual finding on this point

(that the tribe had no rights under the treaty because no one signed for them) could not be considered on appeal because the issue had not been properly raised in the assignment of error (J.S. A48)."

The Solicitor General misapprehends appellants' position. This is not a case seeking a review of a factual question, for example, *McCaughn v. Real Estate Etc. Co.*, 297 U.S. 606 (1936). Rather, this is where the appellants are content with the Findings and object to the Conclusions of Law. Thus, this falls within the rules set forth in 5 Am. Jur.2d, Appeal and Error, §841, page 286, as follows:

"... (an appellate court) will set aside a judgment where the facts as determined by him fail to support his legal conclusions drawn from them."

Accord, *Plombe Tool Co. v. Sanger*, 9th Cir., 1952, 193 F.2d 260, 264, and Dictum in *Fleischmann Co. v. United States*, 270 U.S. 347, 356 (1926).

When we consider *all* of the factual findings, we are content because flowing from such *all* factual findings is the conclusion of law that these appellants are parties to the Point Elliott Treaty (12 Stat. 927, J.S. A46-A53). Thus, assigning error to a particular finding as such is unnecessary.

In its Findings of Fact and Conclusions of Law, the trial court held that there was and is a Skope-ahmish Tribe;[1] that the individual appellants are members there-

1. In Conclusion of Law 1, there is a finding of fact as follows:
"... the Court considers, for purposes of this case, those descendants of the aboriginal band who now reside on the Muckleshoot Reservation and who have, for the past year and a half, acted in concert, sufficiently constitutes a tribe for purposes of this case." (St. 232; Tr. 11-12)

of;[2] that their ancestors inhabited the upper reaches of the Green River;[3] that their ancestors, when fishing, employed on the Green River weirs, traps, nets, spears, and gaffs;[4] that by reason of the Point Elliott Treaty the United States took over their lands.[5]

Our point here is that when an Indian tribe is named in the Treaty and, as a part thereof, the tribe ceded its property to the United States, whether the Indian tribe signed the Treaty is immaterial. If the United States accepted the cession of lands from the Indians, it thereby assumed the burdens of the Treaty.

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2. Finding of Fact XXI as follows:

"The individual defendants and other members of the present day Muckleshoot Tribe who claim to have Skope-ahmish blood are most probably descendants of these aboriginal Indians whose lands were taken over by the United States Government following the Treaty of Point Elliott." (St. 230; Tr. 9-10)

3. Finding of Fact XVIH as follows:

"In aboriginal times a band or tribe of Indians known as the Skope-ahmish lived on the upper Green River, which they used to maintain a subsistence existence. They were about fifty in number." (St. 229; Tr. 9)

4. Finding of Fact XXIII as follows:

"The aboriginal band of Skope-ahmish Indians in fishing the Green River employed weirs, traps, nets, spears, and gaffs, . . ." (St. 230; Tr. 10)

5. Finding of Fact XX as follows:

"Following the signing of the Point Elliott Treaty, the lands where the Skope-ahmish Indians resided on the Green River were taken over by the United States, and after the establishment of the Muckleshoot Reservation in 1857, these Indians assumed residence on that reservation." (St. 229; Tr. 10)

and Finding of Fact XXI as follows:

"The individual defendants and other members of the present day Muckleshoot Tribe who claim to have Skope-ahmish blood are most probably descendants of these aboriginal Indians whose lands were taken over by the United States Government following the Treaty of Point Elliott." (St. 230; Tr. 9-10)

and in Conclusion of Law 3, there is a finding of fact as follows:

"That while the Skope-ahmish Indians were unjustly dealt with by the United States in that their land was taken without compensation following the Point Elliott Treaty, . . ." (St. 232; Tr. 12)

Secondly, it is a novelty in the law that one need sign a contract before it becomes one, e.g. unilateral contracts. Restatement of Contracts §21. For the establishment of a contract, so far as one who has performed his promise, it simply does not matter whether he signed the contract. Rather, the other *must* perform likewise. The Indians ceded their lands; *ergo*, the United States must recognize the fishing rights reserved therein, whether the tribe signed or not. Thus, the failure to object to the finding of no signatory is not fatal because the findings by the trial court that the Skope-ahmish tribe is a tribe and that the individual defendants are members thereof and that the tribe lived and fished on the Green River and then ceded these lands to the United States make the finding of no signatory irrelevant; and from these findings, a court must form a Conclusion of Law that the tribe is a *party* to the Treaty.

But more importantly, both the trial court and the State Supreme Court discussed the preamble to the Treaty, and so let us take a look at it (J.S. A-1). We suggest that as a matter of law the factual finding of no signatory on behalf of these tribes must yield to the words of the Treaty itself.

There are two important paragraphs. The first one reads in bare outline as follows, with emphasis added:

> "Whereas a treaty was made . . . by Isaac I. Stevens . . . and the hereinafter-named chiefs, headmen and delegates of the . . . Smalh-kahmish, Skope-ahmish, St-kah-mish . . . *on behalf of said tribes and duly authorized by law;*"

From the foregoing words of authority, one could easily

argue that the agency problem is foreclosed. But our answer to this question is tied down even better in the next paragraph:

> "Articles of agreement . . . by Isaac I. Stevens . . . and the undersigned chiefs, headmen, and delegates of the . . . Smalh-kamish, Skope-ahmish, Stkah-mish . . . *on behalf of said tribes, and duly authorized by them.*"

Thus, from the findings and from the words of the Treaty, one must conclude as a matter of law that these appellants are parties to the Treaty.

It seems a little strange for the Court of Claims to hold that these Indians "were parties to the Treaty of 1855(.)" *Duwamish et al. Indians v. United States,* 79 Ct. Cl. 530, 604, on the one hand, and the irrelevant finding of no signatory to be controlling on the other hand, Cf. 79 Ct. Cl. 530, 556 and 603.

Appellants submit the foregoing contains substantial arguments superficially considered by the trial court and the State Supreme Court (the timeliness of raising these arguments has been developed in J.S. 7-8 and Appellant's Brief Opposing Motion to Dismiss, p. 4) and, when considered in the context of the lower court's invalidating a solemn treaty of the United States after reaping the benefits therefrom and thereby disavowing the promises to such parties, that probable jurisdiction should be noted for a plenary hearing.

Respectfully submitted,

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